Supreme Court, U.S.
FILED
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No. _____

In the
Supreme Court of the United States

MICHAEL D. ROSSI,
Petitioner,

v.

UNION OF NEEDLETRADES, INDUSTRIAL & TEXTILE EMPLOYEES, AFL-CIO,CLC,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal court may condition forbearance from imposition of Rule 11 sanction upon the offending attorney's promise to decline all future representation in an area of law in which he is qualified to practice and competent to handle.

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Other Authority

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OPINIONS BELOW

Neither District Court nor Court of Appeals Opinion is reported.

JURISDICTIONAL STATEMENT

The judgment of the Sixth Circuit Court of Appeals was entered 5/3/06. That Court then entered an order denying a timely Petition for Rehearing on 6/22/06.

Jurisdiction of this Court is invoked under 28 USC § 1254(1), and the timeliness of Petitioner's filing is governed by Supreme Court Rules 13.1 and 13.3.

RELEVANT CONSTITUTIONAL PROVISION AND STATUTE

US CONSTITUTION - AMENDMENT V

"No person shall . . . be deprived of life, liberty or property, without due process of law; . . ."

Also, § 301 of the Labor-Management Relations Act of 1947 (29 USC § 185).

STATEMENT OF THE CASE

Under § 301 of the Labor-Management Relations Act of 1947, Petitioner brought an action against an employer for discharging the plaintiff in violation of the collective bargaining agreement ("CBA"); and against the union, Respondent herein, for breaching its duty of fair representation to the plaintiff, its member. The forum was the U.S. District Court for the Northern District of Ohio (Eastern Division), where the court enjoyed "federal question" jurisdiction.

Plaintiff was fired for refusing to submit to a post-accident drug test contrary to company policy. Respondent grieved the discharge, but ultimately declined to proceed to binding arbitration under the CBA.

Lis pendens, Petitioner settled his client's claim against the employer. The basis for his claim against the Respondent was that, at the time of plaintiff's stated refusal, there was no individualized suspicion of his drug use or impairment; that in an earlier, public sector case, the Ohio Supreme Court had struck down, as unconstitutional, a workers' compensation statute permitting the warrantless drug and alcohol testing of injured workers without any individualized suspicion of drug or alcohol use; that such constituted the announced public policy of the State of Ohio; that plaintiff's discharge contra that policy did not constitute "good and sufficient cause" for discharge within the meaning of the CBA; and that Respondent's failure or refusal to recognize same and proceed to arbitration on that basis was fairly characterized as "without rational explanation" for "breach of duty of fair representation" purposes. Petitioner's qualification to practice and competency to handle a "§ 301" case was never in issue.

Ultimately, Respondent was awarded summary judgment on the merits and then moved the court for sanctions against the Petitioner under Fed. R. Civ. P. 11(b)(2). In pertinent part, the following exchange occurred at hearing on Respondent's motion:

> THE COURT: . . . Mr. Rossi, in your response to the rule of an application, you said far too often this writer has represented discharged employees abandoned by their Unions. Being advocate for the downtrodden I would say is admirable. It does not, however, justify filing and maintaining crappy cases. . . . You did say something else in that same -- following that sentence. 'Just last week, however, in response to a former client's request that he assume another 301 hybrid action, the undersigned photocopied this Court's entry of sanctions, sending it to a former client with a handwritten note that read, 'I'll never take another 301 case as long as I live.'
>
> Was that a spur of the moment response or is that your intention?
>
> MR. ROSSI: I don't know.
>
> * * *
>
> If there is a sanction to be imposed, if Mr. Rossi had stood up here and said to me, 'Your Honor, I'm dead serious, I'm out of the 301 business,' my answer would have been that is sanction enough. He has honestly said to me, 'I am not prepared to make that representation,' because I think that he wants to reserve the opportunity, if someone with a really meritorious 301 case comes along where he doesn't think he'll go 16 for 16, that he actually has a chance of going 1 for 16, that he wants to have the ability to

> undertake that representation. And I am going to respect his reservation of rights in that regard. But, it's going to cost him. And I am going to impose a $5,000 sanction, payable to our Clerk of Courts.

The Court then stayed execution of imposition of sanction pending appeal.

On appeal to the U.S. Court of Appeals for the Sixth Circuit, the District Court judgment was affirmed for want of "abuse of discretion" below. Thereafter, Petitioner moved for, but was denied rehearing per order entered 6/22/06. Petitioner now petitions this Court for plenary review on certiorari.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit Court of Appeals has decided an important question of federal law that has not been, but should be settled by this Court. The conflicting interests are those of the federal judiciary in "curbing abuses of the judicial system," *Cooter & Gell v. Hartmarx Corp.*, 496 US 384, 397, 110 L.Ed.2d 359 (1990), and of an attorney in practicing law without unreasonable governmental interference, *Board of Regents of State Colleges v. Roth*, 408 US 564, 572, 33 L.Ed.2d 548 (1972) pursuant to his professional responsibility under state law. See *United Mineworkers of America, District 12 v. Illinois State Bar Assoc.*, 389 US 217, 222, 19 L.Ed.2d 426 (1967); and Ohio's Code of Professional Responsibility, Ethical Considerations 6-6:

> A lawyer should have pride in his professional endeavors. His obligation to act competently calls for higher motivation than that arising from fear of civil liability or disciplinary penalty.

and 7-1:

> . . . The professional responsibility of a lawyer derives from his membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits. In our government of laws not of men, each member of our society is entitled to have his conduct judged and regulated in accordance with the law; to seek any legal objective through legally permissible means; and to present for adjudication any lawful claim, issue, or defense.

CONCLUSION

For these reasons, the Court should grant the Petition.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 05-3710

[Filed June 22, 2006]

EDGAR FARRIS,
Plaintiff,

MICHAEL D. ROSSI,
Attorney-Appellant,

v.

CARLISLE ENGINEERED PRODUCTS, INC.,
Defendant,

UNION OF NEEDLETRADES, INDUSTRIAL AND TEXTILE EMPLOYEES, AFL-CIO, CLC,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

Before: KEITH and COLE, Circuit Judges; MILLS, District Judge.*

ORDER

Michael D. Rossi has filed a petition for rehearing of this court's order of May 3, 2006, affirming an order imposing sanctions against him pursuant to Fed. R. Civ. P. 11.

Upon consideration, this panel concludes that it did not misapprehend or overlook any point of law or fact when it issued its order. Fed. R. App. P. 40(a).

The petition for rehearing is therefore denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

* The Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 05-3710

[Filed May 3, 2006]

EDGAR FARRIS, Plaintiff,	)
MICHAEL D. ROSSI, Attorney-Appellant,	)
v.	)
CARLISLE ENGINEERED PRODUCTS, INC., Defendant,	)
UNION OF NEEDLETRADES, INDUSTRIAL AND TEXTILE EMPLOYEES, AFL-CIO, CLC, Defendant-Appellee.	)

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OHIO

Before: KEITH and COLE, Circuit Judges; MILLS, District Judge.*

ORDER

Michael D. Rossi, the attorney for an unsuccessful plaintiff in an action under § 301 of the Labor Management Relations Act, appeals an order imposing sanctions of $5,000 against him pursuant to Fed. R. Civ. P. 11. Counsel have waived oral argument and this panel unanimously agrees that oral argument is not needed in this case. Fed. R. App. P. 34(a).

The underlying complaint in this case alleged that plaintiff was discharged in violation of a collective bargaining agreement, and that his former union breached the duty of fair representation when it failed to arbitrate the discharge. Plaintiff settled the claim against his former employer. The breach of fair representation claim against the union proceeded, with the parties consenting to present the case to a magistrate judge. The magistrate judge granted the union's motion for summary judgment. The union then moved for sanctions under Fed. R. Civ. P. 11, which the magistrate judge found were appropriate. The union then submitted its statement of attorney fees and costs of nearly $30,000. The magistrate judge found the statement of fees excessive and denied defendant's motion for an award of fees and costs; instead, a sanction of $5,000 payable to the court was imposed.

* The Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

This appeal followed. The attorney-appellant argues that the action below was based on a non-frivolous argument for the extension of existing law, pursuant to Rule 11 (b)(2), and sanctions were therefore inappropriate. Defendant has filed a motion for sanctions pursuant to Fed. R. App. P. 38, seeking double costs and attorney fees; appellant has filed a response and moves for $750 in fees for filing said response; and defendant has filed a reply.

An order imposing sanctions under Fed. R. Civ. P. 11 is reviewed for an abuse of discretion. *Tropf v. Fidelity Nat'l Title Ins. Co.*, 289 F.3d 929, 936 (6th Cir. 2002). In determining whether sanctions were appropriate, the test applied is whether the attorney's conduct was reasonable under the circumstances. *Id.* at 939.

In this case, the plaintiff was discharged for refusing to submit to a drug test. In order to establish a breach of the duty of fair representation by the union, he was required to show that the union's decision not to take his case to arbitration was irrational. *Air Line Pilots Ass'n, Int'l v. O'Neill*, 49 U.S. 65, 67 (1991). Counsel argued that, if plaintiff had been an at-will employee rather than a member of a union, he could file a wrongful discharge action alleging that his former employer violated public policy by discharging him. *See Himmel v. Ford Motor Co.*, 342 F.3d 593, 598 (6th Cir. 2003). He attempted to establish that there was a public policy against drug tests in the absence of reasonable suspicion of drug use by citing *State ex rel. Ohio AFL-CIO v. Ohio BWC*, 780 N.E.2d 981 (Ohio 2002). However, that case stated that the constitutional requirement of reasonable suspicion did not apply to private parties. *Id.* at 985. The Supreme Court has also held that private employers need not limit drug tests to employees suspected of drug use. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989).

Therefore, the magistrate judge found that counsel had no legal basis for this complaint, and that his conduct in pursuing the claim was not reasonable. Although counsel reasserts his argument on appeal, no abuse of discretion by the magistrate judge has been demonstrated.

Sanctions under Fed. R. App. P. 38 are proper only where the result on appeal is obvious or the argument presented is wholly without merit. *Pieper v. Am. Arbitration Ass'n*, 336 F.3d 458, 465 (6th Cir. 2003). Although a Rule 11 sanction order is reviewed only for an abuse of discretion, the result is not necessarily obvious. Therefore, the motion for sanctions under Fed. R. App. P. 38 is denied, and both parties shall bear their own costs. The order imposing Rule 11 sanctions is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:03CV2225

[Filed May 5, 2005]

EDGAR FARRIS,	)
Plaintiff,	)
	)
v.	)
	)
CARLISLE ENGINEERED	)
PRODUCTS, INC., et al.,	)
Defendants,	)
	)

Magistrate Judge David S. Perelman

ORDER

UPON CONSIDERATION OF the motion of Defendant UNITE HERE, AFL-CIO/CLC for Rule 11 sanctions, for the reasons stared on the hearing on said motion,

IT IS HEREBY ORDERED that defendant's motion for an award of attorney fees and costs as a sanction is denied, and,

IT IS FURTHER ORDERED that, pursuant to Rule 11(c)(2) of the Federal Rules of Civil Procedure a sanction is imposed upon plaintiff's counsel in the sum of Five Thousand Dollars ($5.000.00) to be paid into the registry of this court; execution thereof stayed for a period of thirty (30) days to permit an appeal of this order to be taken, and extended thereafter during the pendency of such an appeal.

s/DAVID S. PERELMAN
United States Magistrate Judge

DATE: May 5, 2005